Statement of the Case.

The opinion of the California District Court of Appeal contains a map showing the real property here involved. (See Appendix I, p. 4.) The controversy pivots over the parking and recreational uses made by petitioners of the "variance lot," being the southerly 85 feet of Parcel 4 (zoned R-1). The impact of population growth and of automobiles on zoning regulations and the need for reasonable and non-discriminatory enforcement of such regulations in connection with religious and educational institutions and practices, give importance to this case. The background shown by the record is summarized as follows by the opinion below:[1]

> "The pertinent facts as found by the court in the first case and as pleaded by defendants [Petitioners here] is the injunction suit (which we must accept as true since judgment was rendered on the pleadings) are as follows: Defendants purchased the C-1 property totaling 2 acres in 1939. The variance lot was acquired in 1947, and the northern portion of Parcel 4 (nuns' residence) in 1954. In 1948, defendants built a new church as indicated on the map, and in 1950 they built the school. The variance lot has been used since its

[1]The opinion of the District Court of Appeal is concerned not only with petitioners' appeals but also with an appeal by the respondents from an order of the Superior Court which requires respondents to reinstate a building permit for a rectory which petitioners propose to erect on their C-1 property. Said order was affirmed and is not involved in this Petition. The chronology herein stated therefor omits further reference to the building permit controversy and deals with the orders here involved: the denial of petitioners' Petition for Writ of Mandate (filed as part of a cross-complaint) to compel approval of the requested variance relating to the variance lot, and the issuance of an injunction on the pleadings prohibiting petitioners from using their variance lot for stated purposes, namely, parking and recreation.

acquisition in 1947 as a parking lot on Sundays and Holy Days of Obligation, and has been used since 1950 as a playground for the children attending the school. There has been no attempt to conceal these activities. Defendants' monetary investment in the entire property exceeds $300,000. The membership of the church has grown from 150 in 1939, to approximately 3,000 at the time of these actions. The school attendance has increased from 200 to 450. Without the use of the variance lot for the purposes of parking and recreation, there is insufficient space for these activities.

"The background and chronology of the suits here involved are as follows: Soon after acquisition of the northern portion of Parcel 4 in 1954, defendants developed plans to improve their property by the construction of a new rectory on the C-1 property. Pursuant to this expansion program, on March 2, 1956, defendants applied for a zoning variance for the variance lot to allow its use as a parking lot and for recreational purposes.[2] The city planning commission denied the application and the defendants appealed to the city council."[2]

At the hearing before the city council, property owners in the neighborhood testified for and against the granting of the zoning variance.[3] But petitioners

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[2]A more elaborate statement of the above, with record references, is found in these petitioners' "Appellants' Opening Briefs in Nos. 23660 and 24244 and Respondents' Brief in No. 24244", pages 4-14, which has been certified as part of the record herein.

[3]Testimony of persons in support of the variance appears at pp. 57-75 and 98-100 of the Reporter's Transcript of proceedings before the City Council of San Marino, which is part of the certified record here. Testimony of opponents appears at pages 77-95 of this Reporter's Transcript.

offered evidence and it was stipulated that similarly situated religious groups (not only in the same community but in the same neighborhood), as well as business establishments (also in the same neighborhood) had been granted the precise variance requested by petitioners. [See Rep. Tr. of proceedings before City Council of San Marino, California, pp. 47-57, reproduced here as Appendix IV, showing variances to St. Edmund's Espicopal Church, to the Community Church, to two Shopping Bag stores, Van de Kamp market and San Marino Market, and to San Marino Properties.]

The city council nevertheless also denied the application for a variance, and petitioners thereafter on January 4, 1957, filed their Petition for Writ of Mandate in the Superior Court of Los Angeles County to compel issuance of the variance. The Petition for Writ of Mandate incorporated the Reporter's Transcript of the hearing before the City Council. [Clk. Tr. p. 20, lines 23-26, in 2nd Civ. No. 24244.][4]

Thereafter on May 3, 1957, the respondent city filed a second action (being numbered Pasa. C-5972 in the trial court and 2nd Civ. No. 23660 in the California District Court of Appeal.) Here the city prayed for an injunction to abate an alleged nuisance, to wit, the

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[4]The Petition for Writ of Mandate was filed as a cross-complaint in the action numbered Pasa. C-5682 in the trial court, being 2nd Civ. No. 24244 in the California District Court of Appeal. It appears at pages 17-26 of the Clerk's Transcript in said case in the certified record. In addition to incorporating the oral proceedings before the City Council, the Petition alleged:

> "That Respondent's failure and refusal to grant a variance as applied for by Petitioner is also causing Petitioner irreparable loss and damage and no adequate or speedy remedy is available at law. [Clk. Tr. p. 21, lines 30-33.]

use of the R-1 Variance Lot for parking and recreation, said use being in violation of Section 23.9 of the San Marino City Code.[5]

Petitioners' Answer [Clk. Tr. pp. 9-17] alleged: (1) That the city was estopped to enjoin the uses complained of because of the long-continued, open, and notorious use by defendants for these purposes; (2) that the city knew of the uses to which the property was put by defendants; (3) that the city knew that no one was damaged by such use and that no property value depreciation was caused by reason thereof; and (4) that the city knew that defendants had need of the space for the uses complained of because of substantial increases in both the number of parishioners and school children. The first portion of the answer concluded as follows:

> "That by reason of the said foregoing facts and circumstances and said unrestrained use of the said Parcel 25. (Variance lot) Plaintiff [city] is not entitled to any relief. That any restraint by this court at this time would inflict unnecessary injury to said parishioners and school children *and would invade private property beyond reasonable needs.*" [Clk. Tr. p. 14. lines 6-9.]

Petitioners' answer also alleged the history of the controversy between the parties, including the denial by

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[5]This section of the City Code appears in the certified record at Clerk's Transcript pages 4-5 of 2nd Civ. No. 23660. Other sections of the Code appear in the Clerk's Transcript pages 7-10 of 2nd Civ. No. 24244, and on pages 4-5 of the Reporter's Transcript of proceedings before the City Council of San Marino. The constitutionality of the city code of zoning is not in issue except as it has been applied discriminatorily. The validity of the ordinance does not foreclose a showing of an invalid application thereof. (*Euclid v. Ambler Co.*, 272 U. S. 365, 387, 395.)

the City Council of petitioners' application for a variance and the pendancy of the prior action wherein petitioners were seeking a writ of mandate. The Petitioners' Answer also alleged:

> "Plaintiff [city] has on numerous and diverse occasions, prior to denying Defendants application for variance, granted other Applications for Variance, including some filed by Churches.
>
> "That by reason of said rulings, denials, legislative and administration acts Plaintiff has unreasonably discriminated against Defendants.
>
> "That such acts as set forth herein are unreasonable and not necessary to promote the public welfare." [Clk. Tr. p. 15, lines 21-30.][6]

The Petition for Writ of Mandate to compel issuance of the variance was denied. [The Judgment of the Superior Court appears in Clk. Tr. pp. 89-92, 2nd Civ. No. 24244, reprinted here as Appendix VI.] In the related action an injunction on the pleadings was issued prohibiting these petitioners from using the variance lot for parking or recreation. [The Judgment of the Superior Court appears in Clk. Tr. pp. 24-27, 2nd Civ. No. 23660, reprinted here as Appendix VII.] On appeal, the District Court of Appeal of the State of California, Second Appellate District, affirmed both judgments. (See opinion, Appendix I.) Petitioners'

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[6]As the opinion of the District Court of Appeal states, the allegations of defendants' answer must be accepted as true, inasmuch as judgment was rendered for respondent city on the pleadings.

claim of discriminatory enforcement was disposed of by the proposition that the city had discretion to grant or deny zoning variances. (See p. 18 of Opinion.)

We respectfully submit that in effect petitioners are here seeking review of orders which, though in terms relating only to an R-1 lot and a variance thereon, confirm discriminatory practices by the city and prevent petitioners from effectively and properly using their extensive C-1 property for church and educational purposes long and legally established and flourishing with full knowledge of the city authorities, all in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Reasons for Granting the Writ.

1. A federal question of substance has here been decided in a way not in accord with the applicable decisions of this court. By invoking the rule of alleged discretion available to initial fact finding bodies, the courts below have confirmed discriminatory enforcement of zoning ordinances in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Permitting other churches to operate in the same R-1 zone while denying petitioners the same right for reasons not invoked against the other churches, in a violation of the Equal Protection clause.

Fowler v. Rhode Island, 345 U. S. 67 (1953);

Niemotko v. Maryland, 340 U. S. 268, 272-273 (1951);

Skinner v. Oklahoma, 316 U. S. 535 (1942); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 545 (1934).[7]

2. The right involved is basic to our society. In *Martin v. City of Struthers*, 319 U. S. 141 (1943), involving the door-to-door activity of Jehovah's Witnesses, it is said:

> ". . . Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience." (Pp. 151-152.)

In *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943), the Court said:

> ". . . Freedom of press, freedom of speech, freedom of religion are in a preferred position."

To the same effect are *Follett v. Town of McCormick*, 321 U. S. 573 (1944), at p. 575; *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949); and *Palko v. Connecticut*, 302 U. S. 319, 324-327 (1937).

3. The alleged reasons for denial of the zoning variance—traffic congestion, noise, depreciation of property values—[8] are insufficient to support denial of First

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[7]See also *Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); *Lovell v. Griffin*, 303 U. S. 444 (1938); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Saia v. New York*, 334 U. S. 558 (1948); *Schneider v. New Jersey*, 308 U. S. 147, 161, 162, 163 (1939); *Board of Zoning Appeals v. Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); *Archbishop of Oregon v. Baker*, 140 Ore. 600, 15 P. 2d 391 (1932).

[8]Petitioners attacked the findings of the City Council and of the trial court on these matters. [See Finding XXIII in Clk. Tr. of 2nd Civ. No. 24244, p. 84.] The District Court of Appeal held there was sufficient evidence to support the findings.

Amendment rights, especially where discrimination is the result. The judgments and opinions below ignore the distinction between rights of freedom of assembly and freedom of worship and mere property rights and therefore conflict with the pronouncements of this Court in the following cases in addition to those already cited:

Terminiello v. City of Chicago, 337 U. S. 1, 4 (1949);

West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639 (1943);

Schneider v. New Jersey, 308 U. S. 147, 161 (1939);

Thomas v. Collins, 323 U. S. 516, 529-530 (1945);

Martin v. City of Struthers, 319 U. S. 141, 151-152 (1943).

4. That more than mere property rights are involved is shown by the statement in the opinion of the District Court of Appeal:

> "Without the use of the variance lot for the purposes of parking and recreation, there is insufficient space for these [religious and educational] activities." (Opinion, p. 4, Appendix I.)

[See Opinion, pp. 14-18, Appendix I.] Even if they are supported, which we deny, such findings are insufficient to support denial of First Amendment rights, especially where such alleged reasons have not been invoked against other religious denominations. Further, it is open to petitioners to urge and show, as here, that the particular application of an otherwise valid ordinance violates the due process clause. *Euclid v. Ambler Co.*, 272 U. S. 365, 387, 395.

If adequate place of assembly is denied to petitioners on their own privately owned property under the pretext of regulation of a zoning law, then, on this record, there is a discriminatory denial of freedom of worship. Such a case is especially appropriate for review by this Court.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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